IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1100 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SOMAJI SHAKRAJI THAKOR
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1100 of 1995
MR KR RAVAL for the appellant.
MR KT DAVE, APP, for the Respondent.

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 05/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This appeal arises out of a judgment and order rendered by the learned Additional City Sessions Judge (Court No.11), Ahmedabad, on May 16, 1996 in sessions Case No.316 of 1994, by which the appellant came to be convicted for the offences punishable under Sections 363, 366 and 376 of Indian Penal Code. The appellant was ordered to undergo rigorous imprisonment for three years and to pay a fine of Rs.200/- and, in default, to undergo simple imprisonment for ten days for the offence punishable under Section 363. The appellant was sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.300/- and, in default, to undergo simple imprisonment for a period of 20 days for the offence punishable under Section 366. For the offence punishable under Section 376, the accused-appellant was sentenced to rigorous imprisonment for a period of ten years and to pay a fine of Rs.500/and, in default, to undergo simple imprisonment for a period of one month. Aggrieved by the said judgment and order, the accused-appellant preferred this appeal through his advocate.

2. The matter was specially fixed and was taken up in seriatim. When the matter was called out, learned advocate appearing for the appellant was not present and, therefore, in order that the appellant is properly represented, instead of proceeding with the matter, Registry was directed to appoint a lawyer having at least seven years of standing to argue the matter. For this purpose, the following order was passed by this Court on June 14, 2001 :-

> "The matter wherein accused are convicted and sentenced for shorter sentences and are undergoing imprisonment are specially fixed. Matters are being taken on seriatim. When this matter is called out, learned advocate appearing for the appellant has not remained present. We would have proceeded with the matter but with a view to see that the accused is benefitted by the services of a lawyer, so that he may not feel that he is not defended by a lawyer, we direct the Registry to appoint a lawyer having at least seven years standing to argue the matter on behalf of the appellant. Registry shall appoint an advocate immediately. The matter shall be notified in the next week for final hearing in the subsequent week."

2.1 Following the said order, learned advocate Mr. K.R. Raval came to be appointed to represent the appellant.

3. We have heard Mr. Raval, learned advocate appointed for the appellant and Mr. K. T. Dave, learned Additional Public Prosecutor, for the respondent-State. The record and proceedings are before us and we have been taken through the record and proceedings as well as the judgment and order impugned herein. We have ourselves taken a close look at the record and proceedings.

4. Before proceeding to record the contentions raised by Mr. Raval, learned advocate for the appellant, it would be appropriate to state the facts of the case. A young girl of about six years of age was found in a toilet of a railway coach of the Gandhidham Express (Train No.9104 Up) at Baroda Railway Station on the 26th November, 1993. She was badly ravished and was profusely bleeding. She had passed stool. Though she was not fully unconscious, she had no orientation. The Railway Police, after drawing a Panchnama, took her to SSG Hospital at Baroda where she was treated by Medical Officer-Dr. Sairabanu Ajijkhan Pathan. The medical examination indicated grave injuries on her private parts. There was dislocation and fracture of elbow and an abrasion on right cheek reddish in colour. She was in such a condition that she was required to be admitted in hospital and was kept in hospital till 9.12.1993.

4.1 On the other side, one Alimuddin Shamsuddin Ansari's daughter of the same age group, who was playing outside the house, was found missing from the 25th November, 1993. On the 28th November, 1993, police from Baroda approached him and on receiving information, he along with his wife went to Baroda to find that the girl found from the railway coach at Baroda Station was is daughter-Yasmin. On basis of a report, F.I.R. was lodged by one Umaji Sadashiv, Unarmed Head Constable of Baroda Railway Police. Offence was registered and case was investigated. The girl was kept at Baroda upto early January 1994 and then was brought back to Ahmedabad. Accidently, one day when the girl and her parents were going, they came across the present appellant, who was identified by the girl as the person who had taken her away. It would also be worth to mention that before this, the girl had already disclosed about her being raped and the medical evidence indicated the same. The father of the girl, therefore, immediately approached the accused-appellant and inquired of him about the girl. He

initially denied, but then admitted that he had taken the girl and committed a "mistake". He was, therefore, taken to the police. Police, thereafter, pursued investigation further and, having found sufficient evidence, filed a charge sheet against the accused-appellant. The case was committed to the Court of City Sessions Judge and, ultimately, was transferred to Court No.11. Charge was framed against the accused for the offences punishable under Sections 363, 366 and 376 of Indian Penal Code. The accused pleaded not guilty to the charge and faced the trial.

4.2 Considering the evidence led by the prosecution, the learned Additional City Sessions Judge came to a conclusion that the prosecution was successful in proving the charges against the accused. The accused, therefore, came to be convicted and sentenced as stated above. Aggrieved by the said judgment and order, the present appeal is preferred.

5. Mr. Raval, learned advocate appearing for the appellant, submitted that the entire case against the accused is a sample of concoction. Barring the statement of the prosecutrix before the Court, there is no evidence to connect the accused with the offence. Mr. Raval submitted that it is an evidence of a young child. Even the Trial Court thought it proper not to administer oath and, therefore, no reliance could have been placed on her deposition. Mr. Raval submitted that the test identification parade is not properly carried out and, therefore, the appellant-accused could not have been convicted for the offences with which he was charged. Mr. Raval submitted that there are discrepancies, contradictions and infirmities in the prosecution evidence. He submitted that the dates given by various witnesses are not consistent. It, therefore, raises doubt and benefit may be given to the accused-appellant by allowing this appeal.

6. Learned Additional Public Prosecutor, Mr. Dave, has opposed this appeal. According to him, there is no error whatsoever either of law or of fact committed by the learned Trial Judge while rendering the judgment and order impugned herein.

7. We have considered the rival side contentions in light of the evidence on record.

8. It is difficult to imagine the plight of the prosecutrix and her parents. We are pained even to read what the girl had to undergo. An innocent girl is

induced to go with the accused under a pretext of taking her to her father and then she is raped putting her into pigeon hall like toilet of a running train to an extent that her private part is torn right upto rectum. She passed stool out of pain that she must have suffered. This is what emerges from evidence and is corroborated by medical evidence.

9. What requires to be examined is whether the prosecution has rightly been held to have established the link between the accused and the crime. For that purpose, there is evidence of prosecutrix-Yasmin. She has, in her child like language, described what she had undergone. An attempt is made in cross-examination to indicate some contradictions which, to our mind, are very minor and of no importance. To certain questions which are put regarding the actual fact of commission of rape, she has denied, which would only indicate that the cross-examination does not carry the case of the defence any further. The only contradiction that is sought to be brought on record is whether the accused had initially touched her clothes or not and whether he had removed his trousers or not. She, ultimately, denies them and sticks to her original version. Her deposition remains unshaken so far as kidnapping and rape by the accused is concerned.

10. The version of the prosecutrix gets corroboration from the medical evidence of Dr. Sairabanu Pathan (Ex.16). She says that the tear was such that some of the intestine was protruding from the vagina. She could not examine the private parts of the girl as that could have been done only under anesthesia. She says that the patient was raped forcibly within 24 hours prior to her examining the patient. Colostomy was performed on the girl. She says that the stool found on the person of the girl was possibly passed because of forced intercourse and that the intercourse must have been of extraordinary nature. The doctor has been cross-examined. She says that, it cannot be said that the injuries found on person of the prosecutrix were possible only out of penetration of male genital. She also admits that, if the girl sustains a fall from a height on a stone, such injuries are possible. To a suggestion that, if the girl had fallen from the upper berth of the train such injuries are possible, she flatly denies.

11. Sum total of the above evidence is that the girl was badly ravished and that her version gets corroboration from medical evidence.

12. To examine the evidence to connect the accused with the offence, there is identification by the girl when the accused comes across her and her parents accidently. Even, thereafter, a test identification parade has been arranged where also she identifies the accused. We have closely scrutinized evidence regarding the test identification parade to find no lacuna, irregularity or illegality. Mr. Raval was also at loss to point out any.

12.1 Depositions of father of the victim, Alimuddin Shamsuddin Ansari (Ex.11) and mother of the victim, Sairabanu Alimuddin Ansari (Ex.13) consistently indicate that the girl had identified the accused initially and subsequently when the test identification parade was held. Mr. Raval contended that, if as per the say of Sairabanu, the girl had told that the man who was serving tea had taken her away, the assailant was, therefore, identified and, as such, there was no question of holding the test identification parade. In this regard, if the cross-examination of the said witness is seen, in paragraph 8, she admits that, in her police statement, she had not stated that the girl had told that the boy who was serving tea had taken her away. This appears to be an exaggerated version coming from the witness at the time of deposition, or she may have omitted to state this fact before the police. In either case, it is not such a contradiction or omission which would hit at the root of the prosecution case when otherwise the evidence is strong enough to connect the accused with the crime. Assuming for a moment that the girl had told the mother that it was the person who was serving tea who had taken her away, we do not see any suspicious circumstance when the Investigating Officer holds a test identification parade. On the contrary, a fair approach is taken by the Investigating Officer who has tried to make sure that an innocent person may not be implicated on account of an error in identification. Under the circumstances, identity of the accused is established and link between the crime and the accused is also established.

14. In view of the decision rendered by the Apex Court in State of Karnataka v. Hemareddy & Another, A.I.R. 1981 SC 1417 and Girijanandini Devi & Ors. v. Bijendra Narain Choudhary, A.I.R. 1967 SC 1124, we deem it not necessary to repeat the narration of evidence or to reiterate the reasons given by the Trial Court for convicting the accused. We may, however, add that we have thoroughly gone through the record and proceedings so also the judgment and order rendered by the Trial Court and we are in full agreement with the reasoning

adopted and the conclusions arrived at by the learned Trial Judge. We are, therefore, of the view that no case is made out for interfering with the conviction recorded by the learned Trial Judge and, as such, we do not find any merits in Criminal Appeal No.1100 of 1995 preferred by the accused against the judgment and order of conviction. The appeal deserves dismissal and the same is, therefore, dismissed.

[B.C. PATEL, J.]

[A.L. DAVE, J.]

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